

To: CN=Ephraim King/OU=DC/O=USEPA/C=US@EPA[]
From: CN=Ephraim King/OU=DC/O=USEPA/C=US
Sent: Fri 12/23/2011 1:32:11 AM
Subject: Urgent Fw: DRAFT letter on numeric nutrient standards
Martin Ltr 12-22-11 (3).docx

Sent by EPA Wireless E-Mail Services

From: "Opper, Richard" [ropper@mt.gov]
Sent: 12/22/2011 11:53 PM GMT
To: Jim Martin; Ephraim King
Subject: DRAFT letter on numeric nutrient standards

Ephraim and Jim,

I'm attaching a draft letter from Montana DEQ to Jim that outlines our plans to adopt numeric nutrient standards and describes our implementation strategy (including adoption of our variance). Ephraim, I think the letter follows the approach we talked about, but I can be a little dense at times. So if I'm way off base, I need you to tell me. I'm a firm believer in the "No Surprises" rule, so I'm sending you this courtesy draft off the record before I send anything official. Obviously, I'm open to your suggestions.

I'm probably taking tomorrow off, but you can call me on my cell at 406-671-0007 if you want to discuss it. Obviously, I'm pushing this issue now, because I heard rumors that Ephraim was thinking about retiring. I certainly hope they're not true! If we don't talk tomorrow, can we try to touch base early next week? Thanks, and have a wonderful Christmas.

Richard

December 22, 2011

Mr. Jim Martin
Regional Director
US EPA Region 8
1595 Wynkoop Street
Denver, CO 80202-1129

Dear Jim:

This letter is to inform the Environmental Protection Agency (EPA) of Montana Department of Environmental Quality's (MDEQ) plans to adopt numeric nutrient water quality standards, and our subsequent variance process to implement those standards.

First, I would like to thank you and your agency for your collaboration and commitment of resources throughout this effort. We appreciate the ability to work through the many issues over the course of this obviously high profile endeavor. Nutrient criteria and the ensuing reduction strategies are some of the highest water quality priorities for both Montana and EPA.

I think it is important to provide some background in this letter for the effort that's taken place to date. MDEQ has been developing numeric standards for Total Nitrogen (TN) and Total Phosphorus (TP) for over 10 years. Early on, the department realized the low TN and TP concentrations under consideration would be difficult, if not impossible, for Montana municipalities and businesses to meet. Therefore, in 2009 MDEQ proposed State Legislation (SB95) that authorized the department the ability to grant *individual* variances from numeric nutrient standards using financial affordability or limits of technology as tests. One component of that legislation was a formalization of our stakeholder advisory group, known as the Nutrient Work Group (NWG). This group is comprised of representatives from small, medium, and large municipal communities; private point source permitted industries; the timber & agricultural industries; environmental groups; the Montana Department of Commerce; private wastewater engineering consultants; and Conservation Districts.

Following the 2009 legislative session, the department in consultation with the NWG developed another piece of State legislation, which was proposed at the 2011 session (SB367). The bill concluded that substantial and widespread (S&W) economic impacts would occur if permittees were required to meet the base numeric nutrient standards developed by MDEQ. Also, this bill created a general variance

category based on discharge flow, and established permit limits for TP and TN through May 31, 2016. The law requires the department to have rules in place prior to 2016 to ensure no lapse in regulation. Immediately following May 31, 2016 and every 3 years thereafter, the law requires the department to review and update (tighten) the permit values in the general variance category. The 3-year intervals are designed to follow our normal triennial review of water quality standards. Finally, variances are not to exceed 20 years, at which time the state numeric nutrient standards must be met.

Now that Montana has established (but not yet adopted) base numeric nutrient standards and a variance process, it's time to focus on how to implement a path forward. Our implementation approach is described below:

- MDEQ concludes that meeting the standards will cause S&W impacts. Furthermore, reverse osmosis is the only current technology that can meet our draft standards, and the cost of this treatment type is simply too high for Montana stakeholders. However, in good faith, MDEQ agreed to conduct an S&W test on both public and private sectors for EPA's review. The department has completed the public sector test and submitted it to EPA. The department, in consultation with Tetra-Tech Consulting, is currently finalizing the private sector test. We are waiting to get buy-in from EPA on both efforts, and this is a critical step for the progress we both want to achieve.
- This summer the department plans to propose adoption of our base numeric nutrient standards before the Board of Environmental Review (our rule-making authority). The Board only has authority to approve the base standards; adoption of the variance rules will be done by the department itself. However, during this same rule-making process, we plan to adopt into rule the general variances currently in statute, ensuring the entire "package" becomes part of a public process. I'm sure you understand the need to ensure that both the standards and the variance process proceed concurrently.
- Again, MCA 75-5-313 requires the department to update the general variance permit limits immediately following May 31, 2016. It is important to note that we will not have these numbers developed at the time of this summer's rule-making.
- Between now and May 31, 2016, MDEQ plans to continue developing aspects of this process. The department will work with the NWG and EPA to develop permit limits in rule that revise the general categories permit limits for TP and TN and move towards achieving the base numeric standards. The result will be a ratcheting down of the permit numbers as appropriate while still utilizing some tests of affordability and limits of technology. Until the statutory categorical variances expire on May 31, 2016, however, the department has no rule-making authority to adopt revisions to the general variances.

MDEQ views the entire numeric standards and variance process as part of a long-term nutrient reduction strategy. In previous letters to EPA (Richard Oppen to Jim Martin, March 9, 2011), we have pointed out that the implementation of MCA 75-5-313 will result in significant nutrient reductions in Montana waters. Additionally, adoption of our standards will trigger a state-wide phosphorus ban, and will enable the TMDL program to write quality TMDLs with numeric waste load allocations. It will also

improve our MPDES program's ability to write discharge permits. That is why we are anxious to keep the momentum on this process to achieve our common goals.

We believe that Montana's approach to reducing nutrient pollution in waters of the state and U.S. could be a model for other states. Our approach will result in immediate improvement in water quality, since approximately 70% of our water discharges will have to take additional steps just to meet the variance. The approach has the buy-in of a diverse stakeholder group that helped us develop our implementation process. The variance will be tightened over the years. And within a reasonable timeframe, our very strict standards must be met. The approach is consistent with Nancy Stoner's March 2011 memo, and we are convinced that it is consistent with the federal Clean Water Act and approvable by EPA. But all future progress hinges upon EPA's agreement with our assessment. So please let us know whether you believe that our variance process as developed over the years in collaboration with many stakeholders, including EPA, is consistent with the CWA and approvable.

Again, we appreciate EPA's considerable efforts to help us in the effort to ensure clean water for future generations.

Sincerely,

Richard H. Opper
Director

cc. Ephram King, EPA
Julie Dalsoglio, EPA
George Mathieus, DEQ/PPA
Mark Bostrom, DEQ/WQPB
Mike Suplee, DEQ/WQPB
Jeff Blend, DEQ/ PPA